137-632

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1362.

THE RED RIVER CATTLE COMPANY, PLAINTIFF IN ERROR,

vs.

R. H. NEEDHAM AND S. A. NEEDHAM, HIS WIFE; D. R. GASH AND MARY JANE GASH, HIS WIFE, AND JOHN M. GILBERT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 9, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1890.

1 *Caption.*

At a term of the United States circuit court in and for the fifth circuit of the United States and the northern district of Texas, at Dallas—present and presiding, the Honorable Andrew P. McCormick, United States district judge, and which term convened on the 13th day of January, 1890, and adjourned on the 28th day of February, 1890—the following cause, among others, came on for trial, to wit:

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE COMPANY. } No. 1189.

2 STATE OF TEXAS, }
County of Dallas. }

Suit in the U. S. circuit court for the northern district of Texas, at Dallas, Texas. January term, 1889.

To the honorable circuit court of the northern district of Texas, holding sessions at Dallas, Texas:

Your petitioners, S. A. Needham, joined by her husband, Ruthven H. Needham, who reside in Bexar county, Texas, who are citizens of Texas, and Jennie Gash, joined by her husband, G. R. Gash, and John Gilbert, who reside in the city of Louisville and county of Jefferson, in the State of Kentucky, and who are citizens of the State of Kentucky, hereinafter styled plaintiffs, complain*ing* of the Red River Cattle Company, a private corporation and a body corporate created by and under the laws of the State of Illinois, and which body corporate is a citizen of the State of Illinois and has an agent and general manager, to wit, John L. Campbell, who resides in the said State of Texas, conducting the business of said corporation in the said State of Texas, in the county of Montague, in said State of Texas, and within said district, and keeps his place of business, to wit, the business of said corporation, in Montague county, Texas, where the corporation aforesaid, by its said agent and general manager, resides for the purpose of its Texas business.

Plaintiffs respectfully represent that they are and were on the 10th day of July, A. D. 1886, the owners in fee and seized of the following-described tract or parcel of land, viz., known as the William Wallace one-third of a league of land, in Montague county,
3 Texas, about 15 miles north of the town of Montague, and meted and bounded as follows, to wit:

Beginning 600 vrs. S. of the cor. of a 640-acre survey in the name of Philip Carno and the N. W. cor. of the Nathaniel Nations survey of 640 acres, on a mound, whence a cotton-wood marked "H" bears S. 16 E. 500 vrs.; thence S., 1,300 vrs. passes said Nations' survey, and at 2,887 vrs. cor., a pile of stones; thence W. 2,887 vrs., mound, whence a hackberry marked "H" bears S. 18 W. 42 vrs. and one

marked "X" bears S. 22 W. 47 vrs.; thence N. 2,887 vrs., a mound in the prairie; thence E. 2,887 vrs. to place of beginning.

And, being so seized, the defendant corporation, on the 10th day of July, 1886, unlawfully, with force and arms, without plaintiffs' consent, entered and broke plaintiffs' close and ousted and dispossessed plaintiffs of said tract of land, to their great damage, to wit, five hundred ($500.00) dollars.

Plaintiffs aver the rent of said land is annually worth two hundred ($200.00) dollars, and the reasonable value of said land is four thousand four hundred ($4,400.00) dollars.

Premises considered, plaintiffs pray that defendant be cited to answer this petition at your honor's next term of court, and pray judgment for the title and possession of the whole of the said tract of land, plaintiffs' specific interest being an undivided interest of eight-ninths ($\frac{8}{9}$), and their co-tenants, the heirs of Susan Wallace Gilbert, owning the remainder, for whose benefit and plaintiffs' plaintiffs pray for writ of possession ejecting defendant from said entire
4 tract of land and for said rents, to wit, two hundred and fifty (250.00) dollars per annum, for costs of suit, and for all and general relief; and as in duty bound plaintiffs will ever pray.

B. L. AYCOCK,
GEO. H. PLOWMAN,
Att'ys for Plaintiffs.

The foregoing is endorsed as follows, to wit: No. 1189. S. A. Needham *et al. vs.* Red River Cattle Company. This action is brought as well to try title as for damages. Original petition. Filed July 10th, 1888. A. J. Houston, clerk, by Jas. D. Adams, deputy. B. L. Aycock & Geo. H. Plowman, att'ys for plaintiffs.

5 In U. S. Cir. Court for Northern District of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE COMPANY. } No. 1189.

Now comes defendant in above-entitled cause, by attorney, and, for answer to plaintiffs' petition filed herein July 10th, 1888, demurs to same and says it is not sufficient in law; and of this it prays the judgment of the court.

ROBERTSON & COKE,
Def't's Att'ys.

And, for answer herein, defendant, by its attorneys, comes and defends the force and injury, &c., and says that it is not guilty of the said supposed wrongs, injuries, and trespasses above laid to its charge or any or either of them in manner and form as the said plaintiffs hath thereof above complained against *him;* and of this it puts itself upon the country.

ROBERTSON & COKE,
Def't's Att'ys.

And, for further answer and plea in this behalf, defendant says that the said plaintiffs ought not to have and maintain their aforesaid action against defendant, because it says that defendant and those whose estate it has, claiming the same under deeds duly recorded, have had peaceable and adverse possession of the lands and tenements claimed in said plaintiffs' petition, using and enjoying the same and paying all taxes due thereon for a period of more than five years next before the commencement of this suit.

And this defendant is ready to verify.

ROBERTSON & COKE,
Def't's Att'ys.

The foregoing is endorsed as follows, to wit: No. 1189. S. A. Needham *et al. vs.* Red River Cattle Co. Def't's answer. Filed May 6th, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

6 In U. S. Cir. Court, Northern District of Texas, at Dallas.

S. A. NEEDHAN *et al.*
vs.
RED RIVER CATTLE CO. } No. 1189.

Now come plaintiffs Mary Jane Gash, joined by her husband, D. R. Gash, said Mary Jane Gash erroneously styled Jennie Gash and said D. R. Gash by mistake called G. R. Gash in original petition, and file this supplemental petition to their original petition filed July 10th, 1888 — respectfully represent—

That when cause of action accrued in this cause and when the defendant and those under whom it claims wrongfully and unlawfully entered and dispossessed plaintiffs in this cause the said Mary Jane Gash was a *feme covert* at and before said unlawful entry and continued to be down to the present time, being then and still continuing to be the *husband* of David R. Gash.

And this she is ready to verify.

B. L. AYCOCK &
G. H. PLOWMAN,
Attorneys for Plaintiffs.

The foregoing is endorsed as follows, to wit: S. A. Needham *et al. vs.* Red River Cattle Co. Plaintiffs' 1st supplemental petition.

7 S. A. NEEDHAM *et al*
vs.
RED RIVER CATTLE CO. } # 1189.

JAN'Y 24, 1890.

On this day, this cause being called for trial, came the plaintiffs, by attorneys; came also the defendant, by attorneys, and both parties announced ready for trial; thereupon came a jury of twelve good and lawful men, to wit, Lon Green, S. P. Shaffer, J. A. Henderson, W. H. Hilton, W. F. Cottman, John Gray, W. A. Robinson, J. A. Stewart, Wm. Nobles, C. W. Hartup, N. E. Horton, and H. K. Hale,

who were duly elected, empannelled, and sworn to try this cause; and the jury, having heard the pleadings read, the evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and thereafter, on Jan'y 28th, 1890, returned into open court the following verdict, to wit:

"We, the jury, find that plaintiffs are entitled to recover an undivided one-half of the lands in controversy.

C. W. HARTUP, *Foreman.*"

It is therefore considered, ordered, and adjudged by the court that the plaintiffs, S. A. Needham, joined by her husband, R. H. Needham; Mary Jane Gash, joined by her husband, D. R. Gash, and John M. Gilbert, do have and recover of and from the defendant, The Red River Cattle Co., an undivided one-half interest in and to the following-described tract or parcel of land, to wit, known as the William Wallace one-third of a league of land in Montague county, Texas, about 15 miles north of the town of Montague, and meted and bounded as follows, to wit:

Beginning 600 varas S. of the corner of a 640-acre survey in the name of Philip Carns and the N. W. corner of the Nathaniel
8 Nation survey of 640 acres on a mound, whence a cottonwood tree marked X bears S. 16 E. 500 varas, thence S., 1,300 varas passes said Nation survey, and at 2,887 varas, corner, a pile of stones; thence W. 2,887 varas, mound; thence a hackberry marked (H) bears S. 18 W. 42 varas, and one marked (X) bears S. 22 W. 47 varas; thence N. 2,887 varas, a mound in the prairie; thence E. 2,887 varas to place of beginning.

It is further ordered that a writ of possession issue to place the said plaintiffs, S. A. Needham, joined by her husband, R. H. Needham; Mary J. Gash, D. R. Gash, and John M. Gilbert, or their attorneys, in joint possession with the defendant, Red River Cattle Co., coextensive with the said limits, landmarks, metes, and bounds of the said one-third of a league of land.

And it is further ordered and adjudged that the said plaintiffs do have and recover of and from the said defendant all costs in this behalf incurred, for which let execution issue.

And it is further ordered by the court that the officers of court and all parties entitled to costs do have and recover of and from said plaintiffs and defendant all costs by them herein respectively incurred, and that execution issue therefor, in the names of the parties to this suit, for the benefit of said officers and such other persons as are entitled thereto.

9 In U. S. Cir. Court, Northern District of Texas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE COMPANY.

Now comes defendant in above-entitled cause and moves the court to set aside the verdict and judgment rendered thereon, in this:

1st. Because the court erred in refusing to instruct the jury on the question of limitation.

2nd. Because the court erred in withdrawing from the jury the consideration of the question of limitation pleaded and proved by defendant.

3rd. Because the court erred in holding that the failure to record the deed from C. G. Graham to E. T. Morris until March 16th, 1885, deprived defendant of its right to have the question of limitation submitted to the jury.

4th. Because the court erred in withdrawing from the jury all consideration of the defence of limitation on the ground that said deed from Graham to Morris would not support the same because not recorded until March 16th, 1885.

5th. Because the verdict is contrary to the law.

6th. Because the verdict is contrary to the evidence and is not supported by it.

ROBERSTON & COKE,
Att'ys for Def't.

Endorsement: No. 1189. S. A. Needham *et al. vs.* Red River Cattle Co. Def't's motion for new trial. Filed Jan'y 29, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

10 S. A. Needham *et al.* *vs.* Red River Cattle Co. } # 1189.

Feb'y 10th, 1890.

On this day came on to be heard the motion of the defendant for a new trial herein, and the court, having heard and considered said motion, is of the opinion that the same is not well taken. It is therefore ordered that said motion be, and the same is hereby, overruled and refused.

11 United States of America, *Northern District of Texas,* } ss:

To the honorable justices of the Supreme Court of the United States:

And now comes Red River Cattle Company, by Robertson & Coke, its attorneys, and complains that in the records and proceedings, and also in the rendition of judgment in a suit between R. H. & S. A. Needham, D. R. & Mary Jane Gash, and John M. Gilbert, plaintiffs, and said Red River Cattle Company, defendant, tried in the circuit court of the United States for said northern district of Texas, at January term thereof, A. D. eighteen hundred and ninety, and in which judgment was rendered against it on the 28th day of January, A. D. eighteen hundred and ninety, manifest error hath intervened, to the great damage of the said Red River Cattle Company.

Whereof he prays for the allowance of a writ of error and such

other process as may cause the same to be corrected by the Supreme Court aforesaid.

ROBERTSON & COKE,
Attorneys for Def't.

It being made to appear to me by the affidavits accompanying this application and ordered to be filed with it that the lands adjudged to the plaintiffs in aforesaid cause exceed in value the sum of five thousand ($5,000.00) dollars, the said writ of error is allowed and supersedeas bond fixed at the sum of one thousand ($1,000.00) dollars, February 10th, 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

12 The foregoing is endorsed as follows, to wit: S. A. Needham *et al. vs.* Red River Cattle Company. Petition for writ of error. Filed Feb. 10th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

13 Supreme Court of the United States.

RED RIVER CATTLE CO., Plaintiff in Error,
versus
R. H. NEEDHAM and Wife, S. A. NEEDHAM; D. R. GASH and Wife, MARY JANE GASH, and JOHN M. GILBERT, Defendants in Error.

Know all men by these presents that we, Red River Cattle Company, plaintiff in error, and A. S. Belcher and S. F. Wooding, are held and firmly bound unto said R. H. and S. A. Needham, D. R. and Mary Jane Gash, and John M. Gilbert, defendants in error, in the sum of one thousand ($1,000.00) dollars, to be paid to the said R. H. and S. A. Needham, D. R. and Mary Jane Gash, and John M. Gilbert, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals this 8th day of February, 1890.

Whereas the above-named Red River Cattle Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered on January 28th, 1890, in the above action, wherein defendants in error were plaintiffs and plaintiff in error was defendant, by the circuit court of the United States for the northern district of Texas, sitting at Dallas, Texas:

Now, therefore, the condition of this obligation is such that if the above-named Red River Cattle Company, plaintiff in error, shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals.

A. S. BELCHER. [SEAL.]
14 S. F. WOODING. [SEAL.]
RED RIVER CATTLE CO.,
Per JOHN L. CAMPBELL, *Manager.*

THE STATE OF TEXAS, }
County of Montague. }

A. S. Belcher, S. T. Wooding, and John L. Campbell, being duly sworn, depose and say and each for himself saith that he is worth the sum of $1,000.00 over and above all his just debts and liabilities.

Sworn to and subscribed before me this 8th day of February, 1890.

[SEAL.] H. M. SCHOOLFIELD,
Notary Public, Montague County, Texas.

Approved February 10th, 1890.

A. P. McCORMICK,
U. S. Dist. Judge, Northern District of Texas.

The foregoing is endorsed as follows, to wit: S. A. Needham *et al. vs.* Red River Cattle Co. Writ of error bond. Filed Feb. 10th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

15 THE UNITED STATES OF AMERICA:

To R. H. Needham and S. A. Needham, his wife; D. R. Gash and Mary Jane Gash, his wife, and John M. Gilbert, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 5th circuit and northern district of Texas, wherein Red River Cattle Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. P. McCormick, judge of the district court of the United States for the northern district of Texas, sitting as judge of the circuit court of the United States in said district, at Dallas, this 12th day of February, in the year of our Lord one thousand eight hundred and ninety.

A. P. McCORMICK,
Judge of the District Court for the Northern District of Texas, Holding Circuit Court in said District.

15½ [Endorsed:] 1189. S. A. Needham *et al. vs.* Red River Cattle Co. Citation in error. Filed Feb'y 14, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy. Service accepted Feb'y 13th, 1890. Geo. H. Plowman, of counsel for def'ts in error.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between R. H. Needham and wife, S. A. Needham; D. R. Gash & wife, Mary Jane Gash, and John M. Gilbert, plaintiffs, and Red River Cattle Company, defendant, a manifest error hath happened, to the great damage of the said Red River Cattle Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the — day of February, in the year of our Lord one thousand eight hundred and ninety.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.

J. H. FINKS,
Clerk of the Cir. Court of the United States,
By CHAS. H. LEDNUM, *Deputy.*

Allowed by—
HON. A. P. McCORMICK,
U. S. Dist. Judge.

[Endorsed:] A duplicate of this writ has been this day deposited in this office for defendants in error. Feb'y 12, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

17 In U. S. Circuit Court for the Northern District of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE COMPANY.

Be it remembered that on the trial of this cause defendant, to support its plea of the five years' statute of limitations, introduced in evidence the following deeds and written instruments:

1st. A deed from C. C. Wallace to Earl and Manning for all of the

land in controversy except 369 acres in the N. E. cor. of said survey, dated June 28th, 1872, acknowledged same day and properly recorded in Montague county April 28th, 1875. 2nd. Deed from C. C. Wallace to Wm. Hudson for the 369 acres in N. E. cor. of said survey, dated and acknowledged May 23rd, 1872, but not recorded in Montague county. 3rd. Lease from Earl & Manning to Barefoot & Bryant of the land in question except the N. E. cor. of 369 acres belonging to Hudson, dated Feb'y 14th, 1882, duly acknowledged and on April 12th, 1882, duly recorded in Montague county records of deeds, etc. 4th. Deed from H. C. Manning to George W. Barefoot & J. C. Bryant to undivided half interest in the land in question except the N. E. 369 acres of Hudson, dated Oct. 5th, 1882, acknowledged the next day, and duly recorded in Montague county record of deeds, etc., Oct. 10th, 1882. 5th. Deed from Maria L. Earl to George W. Barefoot & J. C. Bryant to undivided half interest in the land in question except the 369 acres out of the N. E. cor. belonging to Hudson, dated and acknowledged Feb'y 26th, 1883, and duly recorded in Montague county record of deeds, etc., March 10th, 1883. 6th. Deed from Wm. Hudson to Geo. W. Barefoot & J. C. Bryant for an undivided interest of 258⅓ acres out of the 369 acres in the N. E. cor. of
18 said land, dated and acknowledged Feb'y 22nd, 1882, and duly recorded in Montague county records Feb'y 25th, 1882. 7th. Deed from said Hudson to said Barefoot & Bryant for an additional 37 acres, undivided, out of said 369 acres, dated and acknowledged March 20th, 1882, and duly recorded March 24th, 1882. 8th. Deed from Albert and wife to Geo. W. Barefoot & J. C. Bryant for 37 acres, undivided, out of said 369 acres in N. E. cor. of said survey, dated and acknowledged Feb'y 14th, 1883, and recorded in Montague county records Feb'y 15th, 1883. 9th. Deed from G. W. Barefoot & J. C. Bryant to C. G. Graham for the land in controversy, dated and acknowledged March 26th, 1883, and duly recorded in Montague county records April 6th, 1883. 10th. Deed from C. G. Graham to E. T. Morris for the land in controversy, dated and acknowledged March 21st, 1884, and duly recorded in the Montague county records on March 16th, 1885. 11th. Deed from E. T. Morris to defendant, Red River Cattle Company, for the land in controversy, dated and acknowledged and recorded in Montague county records on May 22nd, 1885.

Defendant then introduced evidence tending to show that in March or April, 1882, Barefoot & Bryant took possession of the land in controversy and fenced the same with a permanent and substantial fence, and from that date until March 26th, 1883, when they sold to Graham, had exclusive, peaceable, and adverse possession thereof, using and enjoying the same, and excluding all other persons thereform; that they openly and notoriously claimed the said property at first as lessees, and after obtaining deeds to themselves under said deeds that they paid the taxes for the years 1882 and
and 1883 on said lands; that on March 26th, 1883, the date
19 of his purchase and conveyance from said Barefoot & Bryant, the said C. G. Graham received from said Barefoot & Bryant possession of said property, and from that date until the 21st day of

March, 1884, he had and held exclusive, peaceable, and adverse possession thereof, using and enjoying the same, and excluding all others therefrom, and openly and notoriously claiming the same as owner under the deeds hereinbefore set out; that he, as owner of said land, paid all taxes for the year 1884 thereon.

That on March 21st, 1884, the said E. T. Morris received from the said C. G. Graham possession of said land, and from that date until the 22nd day of May, 1885, he had and held exclusive, peaceable, and adverse possession thereof, using and enjoying the same, and excluding all others therefrom, and openly and notoriously claiming the same as owner under the deeds hereinbefore set out, and that as such owner he paid all the taxes thereon for the year 1885; that on the 22nd day of May, 1885, defendant received possession of said land from said E. T. Morris, and from that date until July 10th, 1888, had and held exclusive, peaceable, and adverse possession thereof, using and enjoying the same, and excluding all others therefrom, and openly and notoriously claiming the same as owner under the deeds hereinbefore set out, and that as such owners *they* had paid all taxes on said lands for the years 1886, 1887, and 1888.

The evidence tended to show that since the spring of 1882, March or April, that Earl & Manning, by tenants, Barefoot & Bryant, and Barefoot & Bryant, for themselves and those claiming under them down to and including defendant, had been in adverse, open, peaceable possession of said property, claiming the same under the title hereinbefore set out, paying all taxes on said land for years 1882 to 1888, inclusive; that since the taking of possession by said Barefoot & Bryant down to the present time there had been no break in the possession and the same had been continuous.

Under this state of the evidence the court refused to instruct the jury on the subject of limitations and withdrew from their consideration this defense and all evidence bearing thereon, because the deed from Graham to Morris was not recorded until March 16th, 1885, and the court informed the jury that under the facts in this case the defendant had failed to make out its defense of limitation because of the failure to record said deed from Graham to Morris until March 16th, 1885, and that therefore they would not consider that defense.

To all of which rulings defendant then and there excepted and tenders its bill of exceptions, and prays that the same be signed, sealed, and enrolled and made part of the record in this case, which is accordingly done this 8th day of Feb'y, 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

The foregoing is endorsed as follows, to wit: No. 1189. S. A. Needham *et al. vs.* Red River Cattle Company. Defendant's bill of exceptions. Filed Feb. 10th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

21 In the Circuit Court of the U. S. for the Northern Dist. of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE CO. } No. 1189.

Before me, the undersigned authority, personally appeared John L. Campbell, who, after being duly sworn, on his oath says that he knows the William Wallace survey of land of 1,476 acres, situated in Montague county, and the value thereof, and that he knew it and its value in July, 1888; that said survey was worth on July 10th, 1888, the sum of $11,800.00, and that a half interest therein was then worth $5,500.00; that said survey was worth at the date of the trial of this suit the sum of $14,700.00, and that a half interest therein was at said date worth the sum of $7,000.00.

JOHN L. CAMPBELL.

Sworn to and subscribed before me by John L. Campbell this 7th day of February, 1890.

H. M. SCHOOLFIELD,
[SEAL.] *Notary Public, Montague County, Texas.*

In the Circuit Court of the U. S. for the Northern Dist. of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE CO. } No. 1189.

Before me, the undersigned authority, personally appeared Wade Atkins, who, after being duly sworn, on his oath says that he knows the William Wallace survey of land of 1,476 acres, situated in Montague county, and the value thereof, and that he knew it and its value in July, 1888; that said survey was worth July 10th, 1888, the sum of $11,800.00, and that a half interest therein was then worth $5,500.00; that said survey was worth at the date of the trial of this suit the sum of $14,700.00, and that a half interest therein was at said date worth the sum of $7,000.00.

22 WADE ATKINS.

Sworn to and subscribed before me by Wade Atkins this 7th day of February, 1890.

H. M. SCHOOLFIELD,
[SEAL.] *Notary Public, Montague County, Texas.*

In the Circuit Court of the U. S. for the Northern Dist. of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
THE RED RIVER CATTLE CO. } No. 1189.

Before me, the undersigned authority, personally appeared W. L.

Richards, who, after being duly sworn, on his oath says that he knows the William Wallace survey of land of 1,476 acres, situated in Montague county, Texas, and the value thereof, and that he knew it and its value in July, 1888; that said survey was worth on July 10th, 1888, the sum of $11,800.00, and that a half interest therein was then worth $5,000.00; that said survey was worth at the date of the trial of this suit the sum of $14,700.00, and that a half interest therein was at said date worth the sum of $7,000.00.

W. L. RICHARDS.

Sworn to and subscribed before me by W. L. Richards this 7th day of February, 1890.

[SEAL.] H. M. SCHOOLFIELD,
Notary Public, Montague County, Texas.

The foregoing is endorsed as follows, to wit: S. A. Needham *et al. vs.* Red River Cattle Co. Affidavits of value. Filed Feb. 10th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

23 In U. S. Circuit Court for the Northern District of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE CO. } No. 1189.

THE STATE OF TEXAS, }
County of Montague. }

This day personally appeared before me, Henry Hardy, judge of the county court of Montague county, Texas, J. C. Bryant, to me well known as a credible citizen of Montague county, Texas, and, being by me duly sworn according to law, on oath says that he is well acquainted with the location and value of a 1,476-acre survey in the name of William Wallace, in Montague county, Texas, being the same tract now in litigation in U. S. circuit court for the northern district of Texas, at Dallas, and that the said land was not worth more than five dollars per acre on the 10th day of July, 1888, nor exceeding the aggregate sum of $7,380.00, and that said land is not now worth exceeding the sum of $7,380.

J. C. BRYANT.

Sworn to and subscribed before me this Feb. 20th, 1890.
Witness my hand and seal of office.

[SEAL.] HENRY HARDY,
County Judge, Montague Co., Texas.

The foregoing is endorsed as follows, to wit: No. 1. Affidavit of J. C. Bryant.

In U. S. Circuit Court for the Northern District of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE CO.

THE STATE OF TEXAS,
County of Montague.

24 Before me, Henry Hardy, county judge in and for Montague county, Texas, on this day appeared in person G. M. Bush, known to me to be a credible citizen of said county, and, after first being by me duly sworn, says on his oath that he is well acquainted with the location and value of the 1,476-acre survey of land in Montague county in the name of William Wallace and being the same land now in litigation in the U. S. circuit court of Texas, at Dallas, and the said land was not worth more than four dollars per acre on the 10th day of July, 1888, nor in the aggregate sum of $5,904, and that said land is not now worth exceeding the sum of $5,904.

G. M. BUSH.

Sworn to and subscribed before me this 20th day of Feb., 1890.
[SEAL.] HENRY HARDY,
County Judge, Montague Co., Texas.

The foregoing is endorsed as follows, to wit: No. 2. Affidavit of G. M. Bush.

In U. S. Circuit Court for the Northern District of Texas, at Dallas, Texas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE CO.

THE STATE OF TEXAS,
County of Montague.

This day personally appeared before me, Henry Hardy, county judge of Montague county, Texas, R. M. Bourland, to me well known as a reputable citizen of Montague county, Texas, and who, being by me duly sworn, on oath says that he has been over the William Wallace survey, in Montague county, Texas, near Belknap creek, in said county, Texas, but does not know the boundaries nor
25 the quantity of land in the survey, but is informed that it is the same tract now in controversy in the circuit court of the U. S. for northern district of Texas, at Dallas; that he knows the value of lands in that locality, and that the same is not exceeding five dollars per acre, except for improved or very choice tracts, and that he does not think said land could be fairly sold for exceeding the sum of five dollars per acre, and that where the title to said land could not be conveyed for more than half an interest therein the —

would not be so much, and that this valuation *extends* the valuation thereof during the year 1888.

R. M. BOURLAND.

Sworn to and subscribed before me this Feb. 20th, 1890.
Witness my hand — seal of office.
[SEAL.]
HENRY HARDY,
County Judge, Montague Co., Texas.

The foregoing is endorsed as follows, to wit: No. 3. Affidavit of R. M. Bourland.

In U. S. Circuit Court for the Northern District of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE CO.

THE STATE OF TEXAS,
County of Montague.

Before me, the undersigned authority, on this day personally appeared *before me* Thomas R. Willis, known to me to be a credible citizen of Montague county, Texas, and tax assessor of same, who on oath says that he is the duly qualified and acting assessor of taxes of said Montague county, and was in the years 1888 and 1889,
26 and that the survey of land in this county known as the William Wallace survey of 1,476 acres was rendered for taxes by John L. Campbell, as agent of the Red River Cattle Co., in 1888 at $5,755 and at $5,904 for the year 1889, as is shown by the assessment and rolls of his office, and that the said land in the year 1888 was not worth more than the said sum of $5,755.

T. R. WILLIS,
Assessor of Taxes, Montague Co., Tex.

Sworn to and subscribed before me this 20th day of Feb., 1890.
[SEAL.]
HENRY HARDY,
County Judge, Montague Co., Texas.

The foregoing is endorsed as follows, to wit: No. 4. Affidavit of Thomas R. Willis, tax assessor.

MONTAGUE, TEX., *Feb. 2d*, 1890.

George H. Plowman, Esq., Dallas, Texas.

DEAR SIR: Your favor to Mr. B. L. Aycock in our care is at hand, and we have hastily prepared some affidavits of such persons as we find in town to-day and who know something of the land:

We got Mr. Bryant, who once owned it. Mr. Barefoot refuses to make an affidavit, but says the land is not worth more than five dollars per acre now.

Col. Aycock did not come up here. The case here was continued. We forward your letter to him.

Very truly, SPARKS & SMITH.

The foregoing is endorsed as follows, to wit: No. 5. Letter of Sparks & Smith.

27 In Circuit Court of U. S. for Northern District of Texas, at Dallas.

S. A. NEEDHAM *et al.*
vs.
RED RIVER CATTLE CO.

Now come plaintiffs, by attorneys, and move the court to dismiss and set aside the allowance of writ of error in the above cause upon the following grounds, to wit:

1st. Because no notice of the filing of application for writ of error was given plaintiffs.

2nd. Because plaintiffs averred in their original petition that the 1,476 acres Wm. Wallace survey was of the value of four thousand four hundred dollars, and same was not controverted by defendant, and there was no proof adduced by defendant to the contrary.

3rd. Because the value of the land in controversy does not exceed the sum of five thousand dollars, as is shown by affidavits of J. C. Bryant, former claimant of said land, and G. M. Bush, R. M. Bourland, and Thomas R. Willis, tax assessor of Montague county, and the letters of Sparks & Smith — November 1st to 5th respectively, and referred to as a part of this motion, and also as is shown by the certificate of comptroller of State of Texas.

Plaintiffs further show that as soon as they discovered that the estimate and value put upon said land by defendant was incorrect they at once procured affidavits to this fact, and same were received late yesterday, Friday, Feb'y 21st, 1890.

Wherefore plaintiffs contest the granting of said defendant's application for writ of error and the value of the land in controversy, and pray that the same be set aside; and, as in duty
28 bound, plaintiffs will ever pray, etc.

B. L. AYCOCK &
GEO. H. PLOWMAN,
Attorneys for Plaintiffs.

The foregoing is endorsed as follows, to wit: No. 1189. S. A. Needham *et al. vs.* Red River Cattle Co. Pl'ffs' motion and contest of def't's application for writ of error. Filed Feb'y 22nd, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

29 S. A. NEEDHAM *et al.* *vs.* RED RIVER CATTLE CO. } # 1189.

FEB'Y 22D, 1890.

On this day came on to be heard the motion of the plaintiffs to set aside the writ of error granted herein; and the court having heard and considered said motion, and being of the opinion that the question of the value of the land in controversy is a question that the trial judge is not called upon to decide, but one to be determined in the supreme court on the affidavits if they see fit to consider them, in order to determine their jurisdiction, it is ordered by the court that said motion be refused.

30 RED RIVER CATTLE COMPANY, Plaintiff in Error, *vs.* R. H. NEEDHAM and Wife, S. A. NEEDHAM; D. R. Gash and Wife, Mary Jane Gash, and John M. Gilbert, Defendants in Error. } In Error to the Supreme Court of the United States.

Now comes The Red River Cattle Company, plaintiff in error, by its attorneys, before the justices of the Supreme Court of the United States, at Washington, and says that in the record and proceedings of aforesaid cause there is manifest error, in this, to wit: The court, in the trial of aforesaid cause, erred in withdrawing from the consideration of the jury the defendant's defence of the statute of limitation and all the evidence bearing thereon and in instructing the jury that the defendant had failed to make out its defence of limitation because of the failure to record the deed dated March 21st, 1884, from C. G. Graham to E. T. Morris for the land in controversy until March 16th, 1885, and that therefore the jury would not consider the defence of limitation.

Wherefore said plaintiff in error prays that the judgment in aforesaid cause be reversed, annulled, and held for naught, and that it may have restored to it all that it hath lost by reason of aforesaid judgment.

ROBERTSON & COKE,
Counsel for Red River Cattle Company, Plaintiffs in Error.

31 The foregoing is endorsed as follows, to wit: Red River Cattle Company *vs.* R. H. Needham and wife, S. A. Needham; D. R. Gash and wife, Mary Jane Gash, and John M. Gilbert. Assignment of error. Filed Sept. 17th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

32 *Certificate of Clerk.*

I, J. H. Finks, clerk of the circuit court of the United States in and for the fifth circuit thereof and the northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in cause numbered 1189 of S. A.

Needham *et al, versus* Red River Cattle Company, lately pending in said court at Dallas, Texas, except that the original writ of and citation in error are included in the transcript instead of copies thereof.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof, this the 19th day of September, A. D. 1890.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.

J. H. FINKS,
Clerk of said Circuit Court,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: N. Texas C. C. U. S. No. 1362. The Red River Cattle Company, plaintiff in error, *vs.* R. H. Needham and S. A. Needham, his wife; D. R. Gash, and Mary Jane Gash, his wife, and John M. Gilbert. Filed October 9, 1890.

Supreme Court, U. S.
FILED
DEC 11 1899
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

RED RIVER CATTLE COMPANY, PLAINTIFF IN ERROR.

[*No. 1362.*] *vs.*

R. H. NEEDHAM, ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

SAWNIE ROBERTSON,
Opposing Motion.

JOHN F. WORLEY, Stationer and Printer, Dallas, Texas.

In the Supreme Court of the United States.

RED RIVER CATTLE COMPANY, PLAINTIFF IN ERROR.

[*No. 1362.*] *vs.*

R. H. NEEDHAM, ET AL., DEFENDANTS IN ERROR.

Brief for Plaintiff in Error opposing motion to dismiss writ of error.

The motion to dismiss in this case is made on the ground that the amount involved in not sufficient to give this court jurisdiction. It is contended:— (1) That the petition having alleged that the land sued for was worth $4400 and the record not showing that that allegation was controverted, that it cannot now be shown by affidavit that the land was of greater value than alleged, and of sufficient value to give jurisdiction. (2) That if affidavits were permissible to show jurisdiction those filed by plaintiff in error in this case fail to show by a

fair preponderance that the value of the property is sufficient.

(1). In this state the title to real property is tried by the action of trespass to try title. The fictitious proceedings in the action of ejectment are abolished. (Revised Statutes Art. 4784.) The requisites of the petition in this action are—that it shall state the real names of plaintiff and defendant, shall describe the premises with sufficient certainty to identify the same, shall state the interest that plaintiff claims in the premises, that he was in possession of the premises or entitled to possession, that the defendant afterwards unlawfully dispossessed plaintiff, and withholds from him the possession of the premises, and if rents, profits, or damages are claimed, such facts as show plaintiff entitled thereto and the amount thereof. (Revised Statutes Art. 4786). The defendant in this action may plead not guilty, and under that plea prove any defense to the action except limitation. (Revised Statutes Art. 4792 3). The above provisions of the State Statutes were adopted in July, 1881, by rule No. I of the Circuit Court for the Northern district of Texas as appears by certified copy of said rule on file in this court.

In this case the petition is in the usual and prescribed form, except that it alleges that the land in controversy is of the reasonable value of $4400. The answer is a plea of not guilty, and statute of limitations. (R, 2 & 3.) The judgment and verdict thereon were for an undivided one-half interest in the land sued for. (R. 4.)

It is settled law that when value is a material question in the case below and necessarily involved in its determination, affidavits will not be received to enhance the value shown by the record ; but it is equally clear from the authorities that an allegation of value is without effect when it is injected into a case where value is not and can not be an issue, nor pertinent to any issue in the case.

Counsel for motion relies upon three authorities, but a cursory examination is sufficient to show that they fail to sustain him.

In Richmond vs. Milwaukee, Richmond filed a bill in equity to restrain the conveyance of certain lots claimed by him which had been sold for taxes. He alleged irregularities in imposing the taxes and in the proceedings subsequent thereto. He further alleged that the value of the lots was over $500, and that the taxes imposed, for which said lots had been sold, exceeded their value as assessed on the books of the corporation more than 200 per cent.

The case was argued and submitted on its merits, but the court on inspection of the record dismissed the appeal, because it did not appear that the jurisdictional amount ($2,000) was involved. 21 Howard, 80. At a later day of the term appellant moved to reinstate the case, and filed an affidavit stating the property to be worth more than the jurisdictional amount. In passing on this motion the court says : "If this case were one of those in which affidavits could be received they come too late, for the case has been heard and dismissed for want of jurisdiction ; but it is not a case of that descrip-

tion. The value of the lots about to be sold for corporation taxes was involved directly in the dispute. Their value is stated in the bill, and the amount of taxes imposed upon them, in order to show that the overcharge made by the corporation was unreasonable and oppressive, and their value is stated by the plaintiff to be over $500." 21 Howard, 392.

Bennett vs. Butterworth was in substance, but not form, an action of detinue for four slaves. Their values were separately alleged in the petition, aggregating $2700. The jury found for the plaintiff $1200, the value of the slaves, with 6 1 2 cents damages. The plaintiff thereupon in open court released the $1200, and the court entered judgment for plaintiff for the four slaves, the damages assessed by the jury and costs. From this judgment defendant took a writ of error, which plaintiff (below) moved to dismiss because the amount in controversy was below the jurisdictional requirement. The court held that having himself refused to be bound by the value found by the jury, and having repudiated it, he could not hold the defendant bound by it. The question in that case was which was the criterion of jurisdiction, the allegation in plaintiff's petition, or the finding of the jury, which finding plaintiff had repudiated and rendered inoperative as to himself. In that case the allegation of value was a material one, and on that allegation issue was joined and evidence introduced. On this issue and evidence the jury found a verdict, which finding would have become a final adjudication between the parties had not the plaintiff below been allowed to release before judgement the $1200, the

value found. In that case there were two statements of value; one in the plaintiff's petition; the other in the verdict of the jury. The question before the court was which should be considered in determining jurisdiction. The gist of the decision was that the plaintiff having released the jury's finding of value, and having refused to be bound by it and in effect eliminated it from the case as to himself, that it should not be held to be in the record for any purpose.

In Talkington vs. Dumbleton, Dumbleton brought a suit in equity to set aside a conveyance of land made by him to Talkington in exchange for Talkington's interest in certain saloon property, complainant alleging that the land was worth $7000, and that Talkington had procured the exchange by false representations as to the value of his own property. Talkington in his answer denied that the land was worth $7000, but averred that it was not of greater value than $4000, and that the saloon was of equal value, to-wit, $4000. Testimony was introduced by both parties tending to support the allegations made by them respectively in their pleadings. The court found that the land was and still is of the value of $5000 and no more, and directed Talkington to reconvey, upon the payment to him of $812. From this decree Talkington appealed, and Dumbleton moved to dismiss the appeal because the amount in controversy was not sufficient to give the court jurisdiction. Talkington presented affidavits tending to show that the land was of sufficient value to give jurisdiction. The court say: "Inasmuch as the appellants sought in the court below to establish as part of their defense the

fact that the land was not worth $7000, but only $4000, and succeeded so far as to get the court to find that it did not exceed $5000, we are not inclined to allow the same parties, for the purpose of establishing our jurisdiction, to show by affidavits that the answer of Talkington, the principal defendant, and sworn to by him was erroneous in that particular, even if under any circumstances it would be permissable to show by affidavits that the value appearing in the record was not the true value, which we by no means admit. In Ziegler vs. Hopkins, 117 U. S., 683-689, where affidavits were submitted the finding of the court below as to value was not a material question in the case upon its merits, but was more in the nature of an inquiry, for the purpose of determining whether the appeal should be allowed, as in Wilson vs. Blair, 119 U. S., 387; here, however the value of the property was one of the questions in the case, and necessarily involved in its determination."

It will be observed that in Richmond vs. Milwaukee and in Talkington vs. Dumbleton, the party who sought to give the court jurisdiction by affidavits was obliged by such affidavits to contradict his own sworn pleading on the question of value, where such question was material and vital to his cause below And in Bennett vs. Butterworth the party resisting the jurisdiction was contradicting his own material averment of value contained in his petition, which in the court's view was the only evidence of value in the case, and was endeavoring to bind the opposing party by a finding of the jury which he himself had repudiated and refused to be bound by, and had in effect eliminated from the case.

In all of these cases the parties asking the court to take or refuse jurisdiction changed their notions of value to suit their present interests.

These cases do fully establish that when the question of value is a material one, involved in the decision of the case below, that the record must control and cannot be varied by affidavits, but they go not a step further and do not even squint at such a doctrine as they are here cited to support.

The courts have never gone further than to hold that the value appearing in the record is conclusive when the question of value was a material and issuable fact in the case below. There the reason of the rule ceasing the rule ceases. Where the value does not appear in the record at all the practice of showing it by affidavit in this court is well settled; and we think that the court has already held in a case similar to this that if the value was shown in the record, but was not a material question below, then that the value so appearing is not conclusive. In Ziegler vs. Hopkins, 117 U. S. 684, the court below found as a fact that the value of the premises in dispute exceeded $6000, and affidavits were presented in this court to show that the property was worth less than $5000. In that case the court considered the affidavits, and said: "The court below found as a fact that the value of the premises in dispute exceeds $6000, and this appears on the face of the record, while the affidavits as to value presented by Rosenbaum taken by themselves, show that possibly the property may be worth less than $5000. They are not enough to over-

come the finding of the court below that it was actually worth more than that sum."

In Talkington vs. Dumbleton, above, the court refer to this case, and distinguish it from that case, on the ground that in the Talkington & Dumbleton case, the question of value was a material one, and that in Ziegler vs. Hopkins it was not, but simply a jurisdictional inquiry. On this point they say:—"In Ziegler vs. Hopkins, 117 U. S., where affidavits were submitted, the finding of the court below as to value was not a material question in the case upon its merits, but was more in the nature of an inquiry for the purpose of determining whether the appeal should be allowed."

The allegation of value made by plaintiff's petition in this case was wholly foreign to the issues involved or that could arise in it. It could not possibly be more than an allegation that the property was of sufficient value to give the Circuit Court jurisdiction. Unless defendant was prepared to contend that the property was worth less than $2000, and thereby defeat the Circuit Court's jurisdiction, his denial of such allegation would have raised an immaterial and impertinent issue, and one which he should not have been allowed to raise and on which he should not have been allowed to introduce testimony. In the State courts, where value in such cases is not jurisdictional, plaintiffs' allegation could have been stricken from the record on exception.

Assume that counsel for motion is correct and that plaintiffs' allegation of value should have been denied. Assume that issue was joined as to value. The constitution of the U. S. confers upon parties the right of trial

by jury. This would have been an issue in the case. Would it have been submitted to the jury to determine along with the other issues in the case? If not, why not? If a proper issue in the case the constitution sends it to the jury. We know of no warrant or precedent for such a course. So far as we know the question of the Supreme Court's jurisdiction has never been submitted to a jury in any Circuit Court in the United States.

On page two of counsel's brief he states that defendants in error on hearing of the allowance of the writ of error moved the court to set aside the same, etc. The inference doubtless intended to be drawn was that the taking of the writ of error was a surprise to them. There is nothing in the record to show this, but the contrary. The record shows that the bill of exceptions taken by plaintiff in error was allowed by the court on the 8th day of February, 1890. (R. 10.) A certified copy of a rule of the Circuit Court for the Northern district of Texas, on file in this case, provides that bills of exception * * * * * shall during the term, and within ten days after the ruling or decision excepted to, unless further time be granted, be submitted to the opposing counsel, who shall within three days thereafter, and during the term, make objections, if any * * * * *

The record shows that the bill was signed February 8th, 1890; opposing counsel must therefore have seen it certainly as early as that date, and if he availed himself of the three days as he had a right to do under this rule it was in his hands as early as the 5th of February. The writ of error was granted on February 10th, 1890.

(R. 6) His motion to set aside allowance of writ of error was made on the 22nd day of February, 1890.

Again on page three of brief, counsel referring to the allegation of value in plaintiffs' petition says: "In such a statement there is every assurance that the value is put as high as the fact allows in order to enhance the damages." In this counsel is in error, for the question of the value of the property has no effect whatever and can have none on the question of damages in such a case. Besides in this case plaintiffs as a fact cared nothing for damages, for while they recovered half the land they recovered no damages, and there is nothing in the record to indicate that they attempted to do so.

(2) Assuming it to be settled that plaintiff in error can show the value of the amount in controversy by affidavit, it is admitted that it must be done by a fair preponderance, unless that burden is changed by the allowance of the writ by the court below. See Gage vs. Pumpelly, 108 U. S. p. 164. In this case the requisite value is shown by much more than a fair preponderance.

Plaintiff in error presented with its application for a writ of error three affidavits, putting the value of the whole tract at the date of judgment below at $14700, and a one half interest at $7000. [R. 11 and 12].

Not being advised of any contest as to value these were deemed by counsel and the court to be ample, and the writ was granted February 10th, 1890. Twelve days after defendants filed four controverting affidavits. J. C. Bryan said the land in July 1888, and at the date of his affidavit, was not worth more than $7380, that is $5

per acre. [R. 2.] G. M. Boush stated that it was not worth more than $4 per acre, or $5900 in the aggregate in July, 1888, and at the date of affidavit. [R. 13]. R. M. Bourland stated that it was worth at the date of affidavit $5 per acre. [R. 13]. T. R. Willis stated that he was tax assessor of Montague county. That the land in controversy was rendered for taxes by the agent of plaintiff in error in 1888 at $5755, in 1889 at $5904, and that the land was worth in 1888 $5755. This last affidavit is suspiciously silent as to the value of the land in January, 1890, the date of the judgment, and also as to what proportion the assessed value of property in its locality bore to its actual value. None of said affidavits show any enhancement in the value of the property since 1888, nor do they give any grounds for their estimates; the only man specially qualified to speak on the subject, viz: the Assessor of the County, gives no opinion of value at the date of the judgment, but confines himself to the year 1888.

Since notice of this motion to dismiss, the plaintiff in error, to sustain the issue of value on its part, has filed in this court the following affidavits, which do not appear in the printed record.

1st.—The affidavit of John L Campbell, who says that plaintiff in error purchased this land through him in the year 1885, along with other land, amounting in the aggregate to 5000 acres. That the Wallace tract was above the average in value per acre of the land so purchased, and that said Company paid for said lands the sum of $5 per acre. That at that date said land was 20 miles from any railroad and four miles from any

town. That since said company purchased, a railroad has been constructed, which puts the Wallace survey directly on said road, and that a town has been built adjoining and with one corner upon said survey, and is the principal town between Gainesville and Henrietta in this state, a distance of 75 miles. That in his opinion said railroad and said town have more than doubled the value of the land in controversy. That he has resided in the neighborhood of this land for ten years, and is familiar with the prices asked and obtained for land in said neighborhood and bases above estimate on said prices:

2nd.—R. E. Brown says he has resided in Montague county since 1876. That he has been tax collector of said county for the last six years, and before that was District Clerk. That he is familiar with lands in said county, and with the land in controversy. That it was worth in 1888 $14,760, in January, 1890 $18,435, and a half interest was worth at said date $9,217.50. That the said survey adjoins the town of Belcherville, and is in immediate proximity to the principal line of railway in said county, by reason of which its value has greatly enhanced within the last three or four years.

3.—Flake H. Jones says he is treasurer of Montague county, that he has lived in the county since 1876, and is acquainted with lands in various localities in the county. That he knows the Wallace survey, and knew it in 1888. That it was worth in 1888 $14,760. That said survey is now worth the sum of $17,712, and an undivided one half interest therein is worth $8,856.

4.—George W. Barefoot says he has lived in Montague county since 1871. That he has owned a good deal of land in said county, among other tracts the tract in dispute here. That he knows the value of said land. That it is fine land and advantageously located, near the railroad and adjoining the town of Belcherville. That the said land was worth in 1888 $14,760 and in January, 1890, when the suit was tried, said land was of the value of $17,712, and a half interest therein was of the value of $8,856. That his estimates are made upon his knowledge of actual negotiations and sales, and prices asked and obtained for lands lying in the neighborhood and contiguous to the Wallace survey.

5.—Henry Campbell says that he is familliar with the land in controversy. That it is a fine body of land, and on account of its nearness to the town and railroad is very valuable. That it was worth in January, 1890, $17,312, and a one-half interest $8,656. That he purchased in October, 1889, 320 acres of land in Montague county between three and four miles from the town of Belcherville and one-half mile from the railroad, and gave for the same the sum of $9 per acre. That his land is not equal in quality to the Wallace survey, and is much less advantageously situated.

6.—F. G. Antram says that for two years he has been a real estate agent engaged in the business of buying and selling real estate in Montague county, and especially in and around the town of Belcherville in said county. That he is well posted as to the values of land in the county, and especially in the neighborhood of said town. That he is

familiar with the land in controversy, and was in July, 1888. That the land was worth in 1888 $14,760, and that it was worth in January, 1890, the sum of $22,140 and that a half interest in the same was then worth the sum of $11,070.

7.—Alexander H. Belcher says that he has owned a large body of land in Montague county, and that he still owns in said county in the neighborhood of Belcherville at least 8,000 acres of land. That the land on which said town is situated belonged to him and one John H. Belcher, his kinsman, and that said town was established by them. That his land lies just south of and adjoins Wallace survey in controversy here. That he knows the value of said Wallace land from the prices which he is now obtaining, and has been obtaining for his own lands since they have been upon the market. That in 1887 when he began to sell these lands he had 27,000 acres, that he has continued to sell the same until this time and has now remaining 8,000. That he is familiar with prices of property in and around the town because of his large interests there, and his active management of the sales and negotiations carried on by him in reference to the same. That he knows from actual prices and negotiations by him made of lands in the neighborhood and adjoining the Wallace survey, that said survey was worth and could have been sold for the sum of $14,760 in 1888. That the same was worth and could have been sold in January, 1890, for the sum of $17,712, and that an undivided 1-2 interest in the same was worth the the sum of $8,856.

8th.—E. T. Morris says that he held consid-

erable land interests in Montague county, Texas, and was and is familliar with the prices asked and obtained for lands in said county, and in the neighborhood of the Wallace survey, where his own lands lay. That before the building of the road from Henrietta to Gainesville the Wallace survey was twenty miles from any railroad. That said railroad was constructed and commenced operations in April, 1887. That said town of Belcherville was afterwards laid off. That in May, 1885, he sold the William Wallace survey, along with other lands, to plaintiff in error, for the sum of $5 per acre for the entire body of lands. That the Wallace survey was among the most valuable of the lands sold. That in his judgement, based upon the increase of values brought about by the construction of said railroad and the building of said town of Belcherville, as is evidenced by prices obtained for lands contiguous to the Wallace survey, said Wallace survey has more than doubled in value since he sold the same. That it was worth in July, 1888, about $13,384, and in January, 1890, $17,712, and that an undivided one-half interest was then worth $8,856.

It is evident from the affidavits last referred to that that the value in controvery in this case is far beyond the jurisdictional amount. The persons chosen to make these affidavits have been chosen from among men who are and have been officers in the county and men owning the property in question and property adjoining it, so that it may be shown to the court as far as possible that the affidavits are fairly made and not by irresponsible persons picked up at random.

It appears from the record that plaintiff in error purchased this land on May 22, 1885 (R. 9) and from the affidavits that it paid therefor the sum of $5 per acre. That at that time it was twenty miles from any railroal and four miles from any town, and now that it is directly upon the principal line of railroad in the county, and that a corner of the best town for a distance of 75 miles is on this land. These considerations are overpowering upon any question as to value. If the affidavits referred to above in the printed record and those since filed, do not establiish that the land in controversy in this case is worth more than the sum of $5,000, then it will indeed be difficult to establish such a proposition upon affidavits.

If the court requires us to show the requisite value by a fair preponderance of the evidence, it will not, I take it, be hypercritical in determining the question of a fair preponderance; for refusing this motion means to defendants in error but a review of the judgment below by this court, and an affirmance of the same if they are entitled to it, but it means to plaintiff in error the perpetration of an injustice and a taking from it of its property, if its contention that said judgment is erroneous is correct.

We respectully submit that the motion should be refused.

SAWNIE ROBERTSON,
Counsel for plaintiff in error.

Office Supreme Court U. S.
FILED,
NOV 4 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE RED RIVER CATTLE CO.
vs.
R. H. NEEDHAM *et al.*
No. 1362.

Motion to Dismiss.

W. HALLETT PHILLIPS,
For Motion.

R. O. Polkinhorn, Printer, Washington, D. C.

IN THE

Supreme Court of the United States.

THE RED RIVER CATTLE CO.
vs.
R. H. NEEDHAM *et al.*
} No. 1362.

Motion to Dismiss.

The defendants in error, move to dismiss the writ of error in the above entitled case, on the ground that the amount involved, is not sufficient to give this Court jurisdiction.

W. HALLETT PHILLIPS,
for Motion.

To Counsel for Plaintiff in Error:

Take notice that the above Motion will be submitted three weeks from service hereof.

W. HALLETT PHILLIPS,
for Motion.

"The averment in his petition must be regarded as determining the amount in controversy upon a writ of error brought by either plaintiff or defendant." (8 How., 129.)

In a suit brought by *Dumbleton* vs. *Talkington*, the complainant alleged the value of the property sued for to be $7,000. This the defendant denied, and asserted the value to be $4,000. The decree was in favor of complainant, and placed the value at $5,000. The defendant appealed and on motion to dismiss, complainant endeavored to show by affidavits that the amount was sufficient.

In dismissing the appeal, the court held, that the appellant ought not to be allowed to contradict the allegations of his answer "even if, under any circumstances, it would be permissible to show by affidavits that the value appearing in the record was not the true value, which we by no means admit."

Talkington vs. *Gumbleton*, 123 U. S., 744.

2. If affidavits to show jurisdiction were permissible, those introduced by the plaintiff in error were insufficient for that purpose, and are negatived by opposing affidavits.

It devolved upon the parties seeking the interposition of this court clearly to establish the jurisdiction.

They undertook to do this in the face of the record showing the value in dispute to be insufficient, a statement, which during the progress of the cause, they had not undertaken to controvert.

In the face, of these facts, the affidavits should show beyond all doubt that the statements of the record were incorrect. The rule in ordinary cases,

where there is nothing in the record to show value is, that the plaintiff in error must establish as a fact, by a fair preponderance of testimony, that the value of the property in dispute is sufficient.

Wilson vs. *Blair*, 119 U. S., 387.

In that case contradictory affidavits were filed in the court below by the respective parties. Without formally deciding the question of value, a writ of error was allowed thus sending the case here on the affidavits, free from any decision as to their effect.

Two witnesses swore that the property was worth more than six thousand dollars, and eight that it was worth five thousand or more. Eight witnesses for the defendant swore it was only worth from about $3,000 to $3,500, *and the certificate of the county Clerk* showed it was valued for taxation at only seven hundred dollars. The court held that the decided preponderance of the evidence was against the jurisdiction, and dismissed the writ of error.

In the present instance, three witnesses for plaintiff in error, swear that the half interest in the tract recovered by defendants in error, was worth at the date of the trial $7,000.

On the other hand, two of the witnesses on the other side swear that *the entire tract* was not at the time of trial worth more than $7,380, being at the rate of five dollars per acre.

One of these witnesses, Richards, says that where only the title to a half interest could be conveyed, he did not think the land was worth the rate he had stated. (R., 11.)

A third witness, Bush, swore that the land was not worth more than four dollars per acre, the whole

tract being valued at $5,904. In addition, the assessor of taxes testified that the entire tract was returned for taxes by Campbell the agent of the plaintiff in error, in 1888, at $5,755, and at $5,904 for the year 1889, and that the land in the year 1888 was not worth more than $5,755. (R., 14.)

Under the most liberal view of the case for the plaintiff in error, there does not exist heret hat preponderance of testimony in his favor necessary to establish the jurisdiction. If we are correct in this the writ of error must be dismissed.

W. HALLETT PHILLIPS,
For Motion.

Office Supreme Court U. S.
FILED
DEC 15 1890
JAMES H. McKENNEY
Clerk

Supreme Court of the United States.

RED RIVER CATTLE COMPANY

vs.

NEEDHAM *et al.*

No. 1362.

Motion to Dismiss.

REPLY BRIEF FOR DEFENDANTS IN ERROR.

1. It is contended that it is permissible to show by affidavits the value of the matter in dispute to be different from that stated in the record, in order to give jurisdiction here.

No authority has been given sustaining this position, and none can be produced.

The sole reason for ever allowing affidavits to show value, arises when the record is silent on the subject.

Zeigler vs. *Hopkins* (117 U. S., 684), is referred to as indicating that the value appearing in the record does not necessarily control the jurisdiction here, and that a different value can be shown in order to confer jurisdiction.

The court, in this case, however, expressly refused to allow affidavits to overcome the statement of the value sent up with the record, although the finding of value was made for the sole purpose of ascertaining whether an appeal should be allowed, and was not a finding that appeared in the record proper.

The defendants in error produce with their brief a number of affidavits to establish value.

No application has been made here for permission to produce affidavits, nor has any notice been given to counsel here that any such affidavits would be taken.

They are therefore not properly before the court, and should not be considered.

If, under the facts of the case, affidavits on the subject of value are allowable, it would seem that the issue should be tried on the affidavits produced by both parties in the court below, and which, under the order of the court below, have been sent up with the record for the determination of this court. (R., 16.)

The affidavits now produced by the defendants in error materially differ from those produced in the court below in the enhancement of the value of the property.

An effort is made to show that the property at the time of the judgment had increased largely in value since its purchase, by reason of the construction of a railroad and the laying out of an adjacent town.

Mr. Campbell, the agent of the defendants in error, gives another affidavit. In this he says the land has more than doubled its value.

But this increase in value, the affidavit of Brown shows is nothing new, but has existed for "the last three or four years." (Opposing brief, 12.)

Graham, another affiant, says the property was "greatly enhanced in value within the last five years on account of the opening of a railroad, and the building of a town along the line of said road."

The particular town mentioned by Campbell is shown by McLain to have been laid off in 1887.

Campbell's affidavit now produced is strikingly in contrast with the return he made of the whole tract for taxation in the year 1889, in which he values it at $5,904. (R., 14.)

The recovery was limited to one-half the tract.

The judgment was in January, 1890.

Defendant would now have the court believe that one-half the contract was worth at that time over $8,000.

The evidence contained in the return of the company and the assessment based on that return, is more convincing than any number of *ex parte* affidavits now adduced of persons who hold land in the vicinity, and who are naturally desirous to make it appear as possessed of great value.

The evidence produced by the company in the court below, we submit, was more than met by evidence then introduced by the plaintiffs. Such evidence is not to be overcome by a lot of prepared affidavits signed by parties who say the one-half interest in the land was worth, in their opinion, "$8,856."

We submit that it is apparent that the case is one that involves a value much below that necessary to be clearly shown to sustain the jurisdiction here, and that it should be dismissed.

If the court should determine to consider the affidavits produced here by the plaintiff in error, we ask time to introduce counter affidavits

W. HALLETT PHILLIPS.

For Motion to Dismiss.

Rule 1. All laws and rules of procedure and practice prescribed by the Legislature of the State of Texas, as they now exist or as they may be changed and amended from time to time, when the same do not conflict with the law of the United States or a rule of the Supreme Court of the United States or of this court, are hereby adopted as the rule of practice in this court, and all suits by attachment, sequestration, or otherwise brought in this court shall conform to the laws of the State of Texas in force at the time such suit is brought, provided the same does not conflict with a law of the United States or a rule of the Supreme Court of the United States or of this court.

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the above and foregoing is a true and correct copy of a rule adopted by said circuit court, at Dallas, Texas, on July 26th, 1881, as the same appears of record in this court.

In witness whereof I hereunto set my hand and official seal this 8th day of December, 1890.

{ The Seal of the U. S. Circuit Court, }
{ Northern Dist. Texas, Dallas. }

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

Rule B. Bills of exception and special finding of facts which a party may desire to have entered on record shall, during the term and within ten days after the ruling or decision excepted to (unless further time be granted), be submitted to the opposing counsel, who shall, within three days thereafter and during the term, make objections (if any) thereto in writing on a separate piece of paper, specifying the modifications desired. All objections shall be considered as waived unless made within the time limited, and all modifications proposed and not acceded to shall be settled by the court.

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the above and foregoing is a true and correct copy of a rule adopted by said circuit court, at Dallas, Texas, on February 7th, 1887, as the same appears of record in this court.

In witness whereof I hereunto set my hand and official seal this 8th day of December, 1890.

{ The Seal of the U. S. Circuit Court, }
{ Northern Dist Texas, Dallas. }

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

[Endorsed:] Sup. Court U. S. 1890, October term. # 1362. Red River Cattle Company *vs.* R. H. Needham *et al.* Certified copy of rules of the circuit court of the United States for the northern district of Texas. Filed Dec. 11th, 1890.